

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAN MIGUEL HOSPITAL CORP. d/b/a
ALTA VISTA REGIONAL HOSPITAL

Case Nos. 28-CA-21896
28-RC-6518

And

DISTRICT 1199NM, NATIONAL UNION OF
HOSPITAL AND HEALTHCARE EMPLOYEES :

**RESPONDENT / EMPLOYER'S RESPONSE TO NATIONAL LABOR
RELATIONS BOARD'S NOTICE TO SHOW CAUSE**

As the Respondent / Employer in the above-captioned case, San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital (hereafter, "Alta Vista" or the "Hospital") hereby responds, by and through the Hospital's Undersigned Counsel, to the Notice to Show Cause issued on September 30, 2010 by the National Labor Relations Board (hereafter, the "Board") in San Miguel Hospital Corp., 355 NLRB No. 212, as to why the General Counsel Motion for Summary Judgment filed in Case No. 28-CA-21896 should not be granted.

BACKGROUND

On April 10, 2007, District 1199NM, National Union of Hospital and Healthcare Employees (hereafter, the "Union") filed with Region 28 of the Board a Petition for Certification of Representative (hereafter, the "RC Petition"), which was assigned Case No. 28-RC-6518. In the Petition, the Union sought to represent

a Bargaining Unit (hereafter, the “Unit”) which consisted of nearly the entirety of Alta Vista’s workforce. On June 21, 22 and 23, 2007, an Election (hereafter, the “Election”) was held at Alta Vista’s facility. The outcome of the Election was in the Union’s favor, and on August 16, 2007, the Hospital filed Objections to the Election (hereafter, the “Objections”). In furtherance of an Order issued by the Regional Director for Region 28 (hereafter, the “Regional Director”), on September 19, 2007, a hearing on the Objections took place before Hearing Officer Daniel Nelson, who, by a Report issued on November 2, 2007 (hereafter, the “Report on Objections”), overruled the entirety of the Objections.

Accordingly, on November 26, 2007, Alta Vista filed with the Board a variety of Exceptions (hereafter, collectively, the “Exceptions”) to the Report on Objections. On March 4, 2008, the Board, acting through two Members, issued a Decision and Certification of Representative (hereafter, at times, the “2008 Certification”) in which the agency purported to overrule the Exceptions and certify the Union as the exclusive bargaining representative of the Unit.

In the wake of the Certification, Alta Vista refused to bargain with the Union. Consequently, the Union filed an Unfair Labor Practice Charge, which was assigned Case No. 28-CA-21896, alleging the Hospital’s refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”). On May 15, 2008, the General Counsel, *via* the

Regional Director, issued a Complaint which incorporated the Union's allegations (hereafter, the "Complaint"), and shortly thereafter, filed a Motion for Summary Judgment with the Board. On June 30, 2008, the Board, once again acting through only two Members, issued a Decision and Order (hereafter, at times, the "Board's 2008 Decision") in which the Board purported to conclude that Alta Vista's failure to bargain with the Union violated Sections 8(a)(1) and 8(a)(5) of the Act. See San Miguel Hospital Corp., 352 NLRB No. 100.

By a Petition for Review filed with the United States Court of Appeals for the District of Columbia Circuit on July 14, 2008, Alta Vista requested that the Court vacate the Board's 2008 Decision. See Case No. 08-1245, Consolidated With Case No. 08-1300. On September 20, 2010, the Court granted Alta Vista's Petition for Review, insofar as the Board's Decision, along with the 2008 Certification, were issued by a two-Member Board. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). The Court remanded the case to the Board and the attendant mandate was issued on September 24, 2010.¹

Six days later, on September 30, 2010, the Board, now acting through three Members, issued a Decision, Certification of Representative, and Notice to Show

¹ On September 27, 2010, Alta Vista filed six RM Petitions with Region 28 of the Board. See pages 8-10, *infra*.

Cause (hereafter, collectively, the “Board’s 2010 Decision”). See San Miguel Hospital Corp., 355 NLRB No. 212.²

In the Board’s 2010 Decision, as part of Case No. 28-RC-6518, the Board purported to overrule Alta Vista’s Exceptions to the Report on Objections and issue a Certification of Representative (hereafter, at times, the “2010 Certification”) in which the Union was certified as the exclusive bargaining representative of the Unit. In addition, as part of Case No. 28-CA-21896, the Board granted the General Counsel leave to amend the Complaint to conform to the current state of the evidence, and issued a Notice to Show Cause as to why the General Counsel’s Motion for Summary Judgment should not be granted.

ARGUMENT

For the reasons set forth below, the Board should deny the General Counsel’s Motion for Summary Judgment and dismiss the Complaint with prejudice.

1.) The Board Violated Alta Vista’s Due Process Rights

The General Counsel’s Motion for Summary Judgment (hereafter, at times, the “Motion”) presupposes, and indeed, depends upon, the issuance of a valid Certification of Representative in the Union’s favor. To be sure, through the

² The panel which issued the Board’s 2010 Decision included Member Mark Pearce and Member Brian Hayes, neither of whom, of course, took part in the 2008 Certification or the Board’s 2008 Decision.

Board's 2010 Decision, the Union, seemingly, is the beneficiary of a Certification of Representative issued by the Board. However, like the 2008 Certification, the 2010 Certification is invalid, albeit for different reasons.

Indisputably, as the product of a two-Member Board, the 2008 Certification was a legal nullity under New Process Steel. For that reason, the three Members who comprised the agency's panel for the Board's 2010 Decision, particularly Members Pearce and Hayes (see fn. 2, *supra*), were, respectfully, obligated to peruse Alta Vista's Exceptions, review the relevant case law and other legal authority, analyze the Hospital's arguments, and set forth a written disposition of the Exceptions. Put more simply, the panel was obligated to engage in an adjudicatory process. In point of fact, however, the Board's 2010 Decision, including the 2010 Certification, was issued by the Board in the absence of any actual or at least meaningful consideration of the Hospital's Exceptions. As shown above, the first time around, the Board took well over three (3) months to rule upon the Exceptions. Specifically, the Exceptions were filed on November 26, 2007 and the 2008 Certification was issued on March 4, 2008. By contrast, once the Court of Appeals remanded the case to the Board, the agency took only four (4) business days to rule upon the Exceptions. Specifically, the Court of Appeals remanded the case on Friday, September 24, 2010 and the Board's 2010 Decision, including the 2010 Certification, was issued on Thursday, September 30, 2010. In such a narrow

window of time, and in light of the Board's own history with the Exceptions, the fact the Board gave no consideration to the Exceptions is patently clear.

Furthermore, Alta Vista had the right pursuant to § 102.48(d) and § 102.65(e) of the Board's Rules and Regulations to file a "Motion to Reopen the Record" and/or a Motion for Reconsideration" upon remand by the D C Circuit. In its inexplicable haste to "rubber-stamp" its 2008 Decision, the Board effectively precluded Alta Vista from exercising its procedural and substantive rights under the above-cited provisions of the Board's Rules and Regulations. Thus, Alta Vista was denied the opportunity to apprise the Board of the filing of certain RM Petitions (discussed in detail, below) and to argue against "reissuance" of the Board's Certification by presenting at the appropriate time, and in a timely fashion, the points of argument arising from the RM Petitions which Alta Vista is now relegated to advancing in a "Request for Review" of the Regional Director's dismissal of the RM Petitions (see, below), which, of course, will be subject to the constraints governing a "Request for Review" (see Board's Rules § 102.67(c)), where Alta Vista would not have been similarly constrained in presenting the same arguments in support of a "Motion to Reopen the Record" or a "Motion for Reconsideration."

The Board did not cure the two-Member defect of the 2008 Certification and the Board's 2008 Decision by simply adding to the Board's 2010 Decision the

signature line of two Board Members who obviously did not give any meaningful consideration to Alta Vista's Exceptions. Consequently, the Board has violated Alta Vista's due process rights, and the Board's 2010 Decision, including the 2010 Certification, must be vacated as a legal nullity.

2.) The General Counsel Has Not Alleged Any Continuous or Current Violation of the Act

In the Board's 2010 Decision, the Board granted the General Counsel leave to amend the Complaint to conform with the current state of the evidence. See 355 NLRB No. 212, page 2. The General Counsel did not, however, file any amendments to the Complaint, much less allege any continued or current violation of the Act on account of the Hospital's unlawful refusal to bargain with the Union. Accordingly, the Board should conclude that the General Counsel has acknowledged, albeit *sub silentio*, that Alta Vista has not unlawfully refused to bargain with the Union. Alternatively, the Board should conclude that the General Counsel's failure to amend the Complaint equates to a deliberate failure to prosecute. Either way, irrespective of the particular grounds, the Board should deny the Motion and dismiss the Complaint with prejudice.

3. **The Board's Jefferson Chemical Doctrine Mandates Denial of the Motion and Dismissal of the Complaint**

In Jefferson Chemical, the Board held that the General Counsel should be precluded from litigating an unfair labor practice allegation in an instant unfair labor practice proceeding in circumstances where the General Counsel was previously aware of, or previously should have known about, the facts underlying the allegation. 200 NLRB992 (1972). So, too, here the General Counsel knew or reasonably should have known at the time the Complaint was issued and prosecuted that a two Member Board lacked the authority to issue a lawful decision and order: to wit, the Board's 2008 Decision. The General Counsel, in persisting to prosecute the unfair labor practice allegations which are the subject of the Complaint is effectively exposing Alta Vista to the administrative prosecutorial "double jeopardy" which Jefferson Chemical was designed to spare a party from suffering. For this reason, also, the Board should deny the General Counsel's Motion for Summary Judgment and dismiss the Complaint.

4. **The 2010 Certification Is Premature In Light of Alta Vista's RM Petitions**

In the Board's 2010 Decision, the agency foresaw the possibility that "events may have occurred during the pendency of this litigation which the parties

wish to bring to our attention.” See 355 NLRB No. 212, page 1. As matters happen, the Hospital does wish to apprise the Board of an event which specifically affects the above-captioned cases. On September 27, 2010, Alta Vista filed with Region 28 of the Board six RM Petitions (hereafter, collectively, the “RM Petitions”), which sought an election in six of the eight bargaining units recognized by the Board’s Healthcare Rule. See Case Nos. 28-RM-620, 621, 622, 623, 624 and 625.³ On November 3, 2010, the Regional Director dismissed the RM Petitions, because the Petitions were not supported by evidence of objective considerations, and in any event, the pendency of unfair labor practice proceedings precluded any question concerning representation. The Hospital intends to file a Request for Review, which, by virtue of the Executive Secretary’s approval today of the Hospital’s extension request, must be filed with the Board by next Monday, November 22, 2010.

Because the Hospital intends to seek review of the Regional Director’s dismissal of the RM Petitions, the Board’s 2010 Decision, including the 2010 Certification, is premature. Needless to say, should the Board grant Alta Vista’s Request for Review, and instruct the Regional Director to hold the elections sought

³ The RM Petitions were filed during the window between the Court’s remand and the Board’s rubber-stamping “recertification” of the Union, at a time when a “question concerning representation” was properly raised under § 9 (c) of the Act, and at a time when no “Certification Bar,” “Recognition Bar” or “Contract Bar” existed, and at a time when the “Election Year Rule” was inapposite.

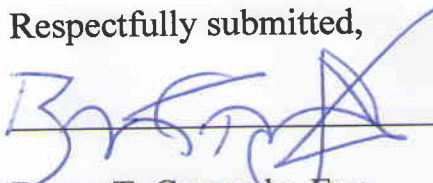
by the RM Petitions, both the Board's 2010 Certification in Case No. 28-RC-6518 and the General Counsel's Complaint in Case No. 28-CA-21896 would be legally invalid. Accordingly, the Board should look at the agency's ruling(s) on Alta Vista's Request for Review as the setting in which to resolve the representative status of the Union and the lawfulness of the Hospital's refusal to bargain. In the meantime, the Board should deny the General Counsel's Motion for Summary Judgment, and dismiss the Complaint.

CONCLUSION

For the reasons set forth above, the Board should deny the General Counsel's Motion for Summary Judgment, and dismiss the Complaint in Case No. 28-CA-21896 with prejudice. Alternatively, due to the General Counsel's failure to amend the Complaint to conform with the current state of the evidence, the Board should rule the General Counsel has either deliberately failed to prosecute the Complaint or conceded the absence of any continued or current violation of the Act, and deny the Motion and dismiss the Complaint with prejudice. Lastly, in light of the Hospital's intention to seek review of the Regional Director's dismissal of the RM Petitions, the Board should deny the Motion for Summary Judgment, and revisit the matters upon, or as part of, the agency's ruling(s) on Alta Vista's Request for Review.

Dated: November 15, 2010
Glastonbury, Connecticut

Respectfully submitted,



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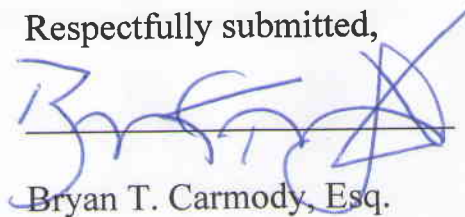
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Dated: November 15, 2010
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